NO. 84-1291

Office - Supreme Court, U.S.
FILED
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ALEXANDER L. STEVAS
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1984

PARK AVENUE INVESTMENT & DEVELOPMENT, INC., a Florida corporation, MARK LOSEE, RALPH SNELGROVE, DREW APGAR, and EVERETT HENSLEY, General Partners d/b/a BAREFOOT MAILMAN, LTD., a Florida limited partnership, BAREFOOT MAILMAN OWNERS ASSOCIATION, INC., a Florida non-profit organization, BAREFOOT MANAGEMENT COMPANY, a Florida corporation, CAXTON, LTD., a British Virgin Island corporation, and MARK LOSEE and DREW APGAR, individually,

Petitioners,

v.

DONALD I. BARKHEIMER, II, PEGGY A. BARKHEIMER, his wife, DONALD L. BARKHEIMER, G. LOUISE BARKHEIMER, his wife, HARRY RANKER, VIRGINIA RANKER, his wife, DENNIS REED, SANDRA REED, his wife, GENEVA L. BARKHEIMER, and JOSEPH D. FARISH, JR., and ROBERT V. ROMANI, d/b/a FARISH, FARISH & ROMANI,

Respondents

ON PETITION FOR WRIT OF CERTIORARI TO THE FLORIDA SUPREME COURT

APPENDIX TO PETITION FOR WRIT OF CERTIORARI VOL. II — APPENDICES I - V

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APPENDIX "I"

FINAL JUDGMENT

IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT OF FLORIDA,
IN AND FOR PALM BEACH COUNTY

CIVIL DIVISION

CASE NO. 82-3158 CA(L) O1 E

DONALD I. BARKHEIMER II, et al.,

Plaintiffs,

vs.

PARK AVENUE INVESTMENT & DEVELOPMENT, INC., et al.,

Defendants

AGREED FINAL JUDGMENT

THIS CAUSE came on to be heard upon the Complaint and Amended Complaint of the Plaintiffs; the Answer, Counterclaim and Crossclaim of the Defendants, CAXTON, LTD., BAREFOOT MAILMAN, LTD., BAREFOOT MANAGEMENT COMPANY and BAREFOOT MAILMAN OWNERS ASSOCIATION, INC.; and the Answer of the Defendants, PARK AVENUE INVESTMENT & DEVELOPMENT, INC., DREW APGAR and MARK LOSEE. The parties have agreed to the following Final Judgment. The Court having considered the Agreed Final Judgment and being otherwise fully advised in the premises, it is

ORDERED AND ADJUDGED as follows:

1. That the Order Granting Partial Summary Judgment previously entered is hereby ratified, approved and incorporated herein.

2. That the Plaintiffs shall have and recover against the Defendants, CAXTON, LTD., BAREFOOT MAILMAN, LTD., BAREFOOT MANAGEMENT COMPANY and BAREFOOT MAILMAN OWNERS ASSOCIATION, INC., the following sums for which let execution issue: The Plaintiffs, ROBERT V. ROMANI and JOS. D. FARISH, JR. shall have and recover $3500.00 against these Defendants; the Plaintiffs, HARRY RANKER and VIRGINIA RANKER, his wife, shall have and recover $1150.00; the Plaintiff, DENNIS REED, shall have and recover $575.00; the Plaintiffs, DONALD I. BARKHEIMER, II and PEGGY A. BARKHEIMER, his wife, shall have and recover $1150.00; and the Plaintiffs, DONALD I. BARKHEIMER and G. LOUISE BARKHEIMER, his wife, shall have and recover $34,700.00. The Defendants, BAREFOOT MAILMAN, LTD., BAREFOOT MANAGEMENT COMPANY, BAREFOOT MAILMAN OWNERS ASSOCIATION, INC. and CAXTON, LTD. shall be jointly and severally liable for the money judgments awarded herein.

3. That jurisdiction is reserved for the taxation of costs against the Defendants to be heard upon proper motion and notice by the Plaintiffs.

4. The Plaintiffs shall not be responsible for any assessments or common expenses which have been incurred or will accrue before the entry of this Final Judgment, relating to those vacation share units declared to be the

property of the Plaintiffs in the Order Granting Partial Summary Judgment incorporated herein.

5. Except as to the amount of damages, Defendants' right to appeal all other issues, including without limiting the generality of the foregoing Order Granting Partial Summary Judgment, is expressly preserved.

6. The Counter-Claim and Cross-Claim of the Defendants, CAXTON, LTD., BAREFOOT MAILMAN, LTD., BAREFOOT MAILMAN OWNERS ASSOCIATION, INC., and BAREFOOT MANAGEMENT COMPANY, are hereby dismissed.

DONE AND ORDERED in Chambers at the Palm Beach County Courthouse, West Palm Beach, Florida, this 31st day of January, 1983.

/s/ W. C. Owen, Jr.
WILLIAM C. OWEN, JR.
Circuit Court Judge

Copies furnished to:

Mikel D. Greene, Esquire, Denco Building, Post Office Box 3887, West Palm Beach, Florida, 33402.
Preston Mighdoll, Esquire, Suite 1-A, 3003 S. Congress Avenue, Palm Springs, Florida, 33461.
Edward F. O'Connor, Esquire, Suite 301-D, 8895 N. Military Trail, Palm Beach Gardens, Florida, 33410.

APPENDIX "J"

MOTION TO SET ASIDE STIPULATION
with affidavit

IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT OF FLORIDA,
IN AND FOR PALM BEACH COUNTY

CASE NO. 82-3158 CA(L) O1 E

DONALD I. BARKHEIMER II, et al.,

Plaintiffs,

vs.

PARK AVENUE INVESTMENT & DEVELOPMENT,
INC., et al.,

Defendants

MOTION TO SET ASIDE STIPULATION

The Defendants move this court for an order setting aside the Stipulation entered into in this cause on the grounds that said stipulation is usurious and unenforceable under Florida Statute 687.171.

I HEREBY CERTIFY that a copy of the foregoing has been furnished to Mikel D. Greene, Farish, Farish & Romani, Denco Bldg., 316 First Street, West Palm Beach, Fl 33402, and Preston Mighdoll, Kohl, Springer, Springer, Varner, Mighdoll & Salnick, 3003 South Congress Avenue, Suite 1A, Palm Springs, Florida 33461, by mail, this 22nd day of December, 1982.

O'CONNOR, BAYLOR, CALLAS
& ELLIOTT
8895 North Military Trail
Suite 301-D
Palm Beach Gardens, Fl 33410
627-0400

By: _____
Edward F. O'Connor

IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT OF FLORIDA,
IN AND FOR PALM BEACH COUNTY

CIVIL DIVISION

NO. 82-3158 CA(L) O1 E

DONALD I. BARKHEIMER II, et al.,

Plaintiffs,

vs.

PARK AVENUE INVESTMENT & DEVELOPMENT, INC., et al.,

Defendants

AFFIDAVIT IN SUPPORT OF
MOTION TO SET ASIDE STIPULATION

COUNT I

PARK AVENUE INVESTMENT & DEVELOPMENT, INC., hereinafter referred to as Park Avenue, sues Plaintiffs DONALD I. BARKHEIMER, II, and PEGGY BARKHEIMER, hereinafter referred to as Barkheimers II, and states:

1. On February 20, 1981, in Palm Beach County, Florida, the Barkheimers II loaned to Park Avenue the sum of $20,000. It was agreed between the parties at that time that Barkheimers II would be repaid the $20,000. plus $3,800. interest within fourteen days. An agreement to this effect was prepared but has been misplaced. The effective interest rate for this transaction was 495.3% per annum.

2. Park Avenue did not pay the $23,800. but instead on March 4, 1981, a new note was signed by Park Avenue with the principal amount of $23,800. and additional interest of $4,370. for a total repayable amount of $28,170. This amount was to be repaid within fourteen days. The interest of $4,370. on the principal amount of $23,800. payable within fourteen days comprises an effective interest rate of 478.7% per annum. A copy of said promissory note is labeled Exhibit 1, attached hereto and by reference made a part of this Counterclaim.

3. The $28,170. was not repaid. Instead, on March 17, 1981, a new note was entered into for a principal amount of $28,170. which was the principal and accrued interest on the prior loan plus interest in the amount of $5,381.18, the total amount payable within fourteen days of the date of said note. The total repayable amount at that time was $33,551.18. The interest payment of $5,381.18 on the principal of $28,170. is an effective interest rate of 498% per annum. The total amount repayable in principal and interest became $33,551.18. A copy of said note is labeled Exhibit 2, attached hereto and by reference made a part of this Counterclaim.

4. On March 30, 1981, Park Avenue paid to Barkheimers II the amount of $14,161. On the same date a new note was executed to Barkheimers II in the amount of $28,025.90. A copy of said promissory note is labeled Exhibit 3, attached hereto and by reference made a part of this Counterclaim. At no time did Barkheimers II ever give to Park Avenue any sum in addition to the $20,000. paid on February 20, 1981. The promissory note of March 30, 1981 which is $8,025.90 over and above the $20,000. paid by Barkheimers II when coupled with the $14,161. paid to Barkheimers II comprises a total of $22,186.90 over and

above the $20,000. paid by Barkheimers II, and constitutes interest. This interest was either paid or accrued during the time period from February 20, 1981 to March 30, 1981 and is approximately 1,000% interest per annum.

5. The March 30, 1981 promissory note was the subject of the complaint in Case No. 82-2952 CA(L) 01 J, and was incorporated in the stipulation which is the subject matter of Counterdefendants' complaint in this cause.

6. Barkheimers II were well aware that the interest being charged was well in excess of 18%.

7. Of the $14,161. paid to Barkheimers II, $13,551. constituted interest.

8. Pursuant to the provisions of 637.04 Florida Statutes Park Avenue is entitled to judgment to twice the interest paid or $27,102.

9. Park Avenue has had to employ the services of the undersigned attorney to represent it in this matter and has agreed to pay him a reasonable fee. There is no legitimate defense available to Plaintiffs and according to 57.105 FSA, Park Avenue is entitled to attorneys fees.

WHEREFORE, Park Avenue demands judgment against Barkheimers II in the amount of $27,102. plus interest, costs and attorneys fees.

COUNT II

PARK AVENUE INVESTMENT & DEVELOPMENT, INC., hereinafter referred to as Park Avenue, sues DONALD BARKHEIMER and LOUISE BARKHEIMER, hereinafter referred to as Barkheimers I, and states:

10. Barkheimers I loaned to Park Avenue, in Palm Beach County, Florida, the following sums on the following dates:

1/15/81	$75,000.00
1/30/81	10,000.00
2/3/81	21,000.00
2/20/81	5,000.00
2/25/81	22,000.00
Total	$133,000.00

11. Barkheimers I and their assigns Michelle Britton and Paul Britton were repaid the following sums on the following dates:

1/17/81	$ 750.00
2/13/81	11,900.00
2/13/81	1,900.00
2/13/81	1,900.00
2/13/81	1,200.00
2/13/81	800.00
2/13/81	190.00
2/25/81	1,900.00
2/25/81	1,900.00
2/25/81	190.00
3/13/81	5,950.00
3/30/81	11,155.28
3/30/81	3,237.10
3/30/81	4,045.00
4/13/81	8,025.00
4/13/81	2,000.00
4/17/81	2,012.00
5/6/81	3,158.00
Total	$62,217.38

12. Of these payments to Barkheimers I, only $20,000. constituted repayments to principal. The balance constitute interest payments.

13. Between January and April, 1981, Park Avenue executed a series of promissory notes in favor of Barkheimers I.

14. On July 2, 1981, suit was instituted by Barkheimers I against Park Avenue for collection of the various monies claimed to be owed to them pursuant to the above related transactions.

15. On September 10, 1981, the parties entered into a stipulation which is the subject matter of this lawsuit wherein the amount agreed upon to be paid to Barkheimers I was $156,383.15.

16. A total interest payment paid to Barkheimers I as of that date was $42,217.38. The amount of principal outstanding and owed to Barkheimers I as of that time was $113,000. The total interest claimed by Barkheimers I, therefore, as of the date of the stipulation was $42,217.38 already paid, plus $43,383.15 claimed by them as additional interest which had not been paid. The interest rate was, therefore, clearly in excess of the 18% allowed by Florida Statute 687.03.

17. Barkheimers I were well aware that the interest rate which they were charging was well in excess of the 18% allowed by Florida statutes.

18. Pursuant to Florida Statute 687.04 Park Avenue is entitled to judgment to twice the interest paid or $84,434.76.

19. Park Avenue has had to employ the services of the undersigned attorney to represent it in this matter and has agreed to pay him a reasonable fee. There is no

legitimate defense available to Plaintiffs and according to 57.105 FSA, Park Avenue is entitled to attorneys fees.

STATE OF FLORIDA
COUNTY OF PALM BEACH

Before me this day personally appeared Mark Losee, who, being first duly sworn, deposes and says:

1. My name is Mark Losee and I am president of Park Avenue Investment & Development, Inc.

2. I have specific knowledge of the facts set forth above and swear that the same are true and correct.

/s/ Signed
Mark Losee

Sworn to and subscribed before me this 20th day of December, 1982.

NOTARY PUBLIC STATE OF FLORIDA AT LARGE
MY COMMISSION EXPIRES MAY 5, 1984
BONDED (Illegible)

/s/ Signed
Notary Public

I HEREBY CERTIFY that a copy of the foregoing has been furnished to Mikel D. Greene, 316 First Street, West Palm Beach, Fl 33401, and Preston Mighdoll, 3003 South Congress Avenue, Suite 1A, Palm Springs, Fl 33461, by mail, this 22nd day of December, 1982.

/s/ Signed
Edward F. O'Connor

March 1, 1981

This will confirm the understanding of the undersigned concerning PARK AVENUE INVESTMENT AND DEVELOPMENT, INC., of Palm Beach Gardens, Florida.

DONALD I. BARKHEIMER II & PEGGY

has contributed the sum of Twenty three thousand and Eight Hundred ($23,800.00) to PARK AVENUE INVESTMENT AND DEVELOPMENT, INC., for investment and corporate operation. The undersigned DONALD I. BARKHEIMER II & PEGGY shall receive within fourteen (14) days, a sum representing the total cash invested by the undersigned TWENTY THREE THOUSAND & EIGHT HUNDRED ($23,800.00) and a profit in the amount of FOUR THOUSAND THREE HUNDRED SEVENTY ($4,370.00) The profits and return of invested capital shall be paid prior to recovery by PARK AVENUE INVESTMENT AND DEVELOPMENT, INC., of any profit.

_____

PARK AVENUE INVESTMENT
& DEVELOPMENT, INC.

BY: /s/ Signed

ATTEST: /s/ Signed

March 17, 1981

This will confirm the understanding of the undersigned concerning PARK AVENUE INVESTMENT AND DEVELOPMENT, INC., of Palm Beach Gardens, Florida.

DONALD I. BARKHEIMER II & PEGGY

has contributed the sum of TWENTY EIGHT THOUSAND ONE HUNDRED SEVENTY DOLLARS ($28,170.00) to PARK AVENUE INVESTMENT AND DEVELOPMENT, INC., for investment and corporate operation. The undersigned DONALD I. BARKHEIMER II & PEGGY shall receive within fourteen (14) days, a sum representing the total cash invested by the undersigned TWENTY EIGHT THOUSAND ONE HUNDRED SEVENTY DOLLARS ($28,170.00) and a profit in the amount of FIVE THOUSAND THREE HUNDRED EIGHTY ONE AND 18/100 DOLLARS ($5,381.18) The profits and return of invested capital shall be paid prior to recovery by PARK AVENUE INVESTMENT AND DEVELOPMENT, INC., of any profit.

_____

PARK AVENUE INVESTMENT
& DEVELOPMENT, INC.

BY: /s/ Signed

ATTEST: /s/ Signed

March 30, 1981

This will confirm the understanding of the undersigned concerning PARK AVENUE INVESTMENT AND DEVELOPMENT, INC., of Palm Beach Gardens, Florida.

DONALD I. BARKHEIMER II & PEGGY

has contributed the sum of TWENTY THREE THOUSAND FIVE HUNDRED FIFTY ONE AND 18/100 ($23,551.18) to PARK AVENUE INVESTMENT AND DEVELOPMENT, INC., for investment and corporate operation. The undersigned DONALD I. BARKHEIMER II & PEGGY shall receive within fourteen (14) days, a sum representing the total cash invested by the undersigned TWENTY THREE THOUSAND FIVE HUNDRED FIFTY ONE AND 18/100 ($23,551.18) and a profit in the amount of FOUR THOUSAND FOUR HUNDRED SEVENTY-FOUR DOLLARS AND 72/100 ($4,474.72) The profits and return of invested capital shall be paid prior to recovery by PARK AVENUE INVESTMENT AND DEVELOPMENT, INC., of any profit.

_____

PARK AVENUE INVESTMENT
& DEVELOPMENT, INC.

BY: /s/ Signed

ATTEST: /s/ Signed

APPENDIX "K"

EXCERPT
of hearing on Motion to Set Aside

IN THE FIFTEENTH JUDICIAL CIRCUIT COURT
IN AND FOR PALM BEACH COUNTY, FLORIDA

CASE NO. 82-3158 CA(L) O1 E

DONALD I. BARKHEIMER, et al.,

Plaintiffs,

vs.

PARK AVENUE INVESTMENT, etc., et al.,

Defendants

_____

EXCERPT OF PROCEEDINGS, TAKEN BEFORE THE HONORABLE WILLIAM C. OWEN, ON TUESDAY, JANUARY 25, 1983.

APPEARANCES:

FARISH, FARISH & ROMANI
316 First Street
Denco Building
West Palm Beach, Florida 33401
by MIKEL D. GREENE, Esquire
for the Plaintiffs

O'CONNOR, BAYLOR, CALLAS & ELLIOTT
8895 North Military Trail
Suite 301 D
Palm Beach Gardens, Florida 33410
by EDWARD F. O'CONNOR, Esquire
for the Defendant Park Avenue

KOHL, SPRINGER, SPRINGER, VARNER,
MIGHDOLL & SALNICK
3003 South Congress Avenue
Palm Springs, Florida 33461
by PRESTON MIGHDOLL, Esquire
for the Defendant Barefoot Mailman

Excerpt of proceedings taken before the HONORABLE WILLIAM C. OWEN, in the Palm Beach County Courthouse, West Palm Beach, Florida, on Tuesday, January 25, 1983, beginning at 9:34 a.m.

* * * *

THE COURT: While I'm not able to really draw for you a clear distinction between what would in one instance be a renewal and what in another instance would be a new and separate obligation, I viewed both the Gunn case and the Manilla versus Perez Cobo (phonetic) case as recognizing that it does not need to be—the old obligation—reduced by or with the usurious interest eliminated and simply then, a new obligation in that reduced amount. I think that it can be in whatever amount the parties agree upon, if it is a separate and distinct obligation substituted for the old rather than a mere renewal.

I see, for example, in some of the pleadings somewhere, maybe in the present case as opposed to the original case, but I read that file and I noted a series of notes in which it was alleged that each was essentially a renewal of the former and, of course, they each kept becoming larger or escalating into higher amounts as the new interest was charged. I consider those renewals.

But it seemed to me that the Stipulation in this case falls within the language in the Gunn case that we talked about earlier; of an abandonment

of the old contract and a new one entered into in place of it. And I've put that in this category.

So it seems to me that whatever character of usury was involved, whatever defense of usury was available has been essentially abandoned, vacated—that's not the right word—but essentially is absorbed into the new agreement.

So as to the Motion to Strike the Stipulation in the prior case, that is denied.

* * * *

THE COURT: I may not have stated it too clearly, but I found that the Stipulation was in effect a new obligation, the effect of which was to eliminate any vice that was inherent in any of the prior obligations. And the Stipulation, as such, is enforceable.

I am relying primarily on Gunn versus Dania Bank.

* * * *

MR. O'CONNOR: So it's clear in my mind with regard to the ruling on my Motion, there were two stages: first, where the original agreements that were entered into between the Plaintiff and the Defendant, those were incorporated—correct me if I'm wrong on this—in the promissory notes. Those promissory notes were the basis of the first lawsuit and they were, in turn, incorporated in the Stipulation. That is correct, is it not?

MR. GREENE: Well, they were sued on the Stipulation entered into. I don't know that they're incorporated.

MR. O'CONNOR: What I'm asking is if the Stipulation purges the usury, of if the entered

into, the second set of promissory notes purges the
usury?

THE COURT: I was concerned only with the Stipulation which I viewed as a new, independent and separate obligation in lieu of and in place of prior existing obligations.

* * * *

CERTIFICATE

THE STATE OF FLORIDA
COUNTY OF PALM BEACH

I, Laura M. Freeman, R.P.R. and Notary Public, State of Florida at Large, do certify that the foregoing pages 2 through 4, inclusive, are a true and correct transcription of my stenotype notes of the foregoing excerpt of proceedings.

WITNESS MY HAND AND SEAL this 28th day of January, 1983.

/s/ Signed
LAURA M. FREEMAN, R.P.R.
and Notary Public,
State of Florida at Large.
My Commission expires:
March 24, 1986.

APPENDIX "L"

ORDER
denying Motion to Set Aside Stipulation

IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT OF FLORIDA,
IN AND FOR PALM BEACH COUNTY

CASE NO. 82-3158-CA(L) O1 E

DONALD I. BARKHEIMER II, et al.,

Plaintiffs,

vs.

PARK AVENUE INVESTMENT & DEVELOPMENT, INC., etc., et al.,

Defendants

ORDER DENYING MOTION OF
DEFENDANTS, PARK AVENUE, ET AL,
TO SET ASIDE STIPULATION

This case is based in part, if not totally, on a certain written stipulation by which parties to certain prior litigation (in which Park Avenue Investment and Development, Inc., one of the Defendants in this action, was also a Defendant) ostensibly settled, that prior litigation. A copy of the stipulation (the "Stipulation") is attached to the Complaint in this action.

On December 29, 1982, a motion was filed by the counsel for certain of the Defendants seeking an order of the court "setting aside the Stipulation entered into in

this cause (sic) on the grounds that said Stipulation is usurious and unenforceable under Florida Statute 687.171 (sic)". This order is addressed to that motion.

This cause was called for trial on January 25, 1983, the undersigned having been assigned to try the case. The Motion to Set Aside the Stipulation was called up for hearing at the time the case was called for trial. The court having considered the affidavits and the argument of counsel orally announced that the Motion to Set Aside the Stipulation was denied on the finding that irrespective of the usurious nature of the notes which form the basis of the prior litigation, the written stipulation for settlement of that litigation constituted a new, independent and separate obligation in lieu and in place of the prior obligation, the effect of which was to eliminate any vice that was inherent in any of the prior and underlying obligations. In making that determination the court relied primarily on the case of *Gunn Plumbing, Inc. v. Dania Bank*, 252 So.2d 1 (Fla. 1971). The court at that time having announced that it was denying the Motion to Set Aside the Stipulation, requested Edward F. O'Connor, Esq., to prepare and submit a proposed order conforming to the court's announced ruling.

Subsequently, Mr. O'Connor submitted a proposed order, and apparently in anticipation that the order would be entered, accompanied that order with a Motion for Reconsideration and Memorandum of Law in support thereof. Upon receipt thereof, the court determined that further argument should be held on the Motion and entered an order setting the matter for further hearing. In view of the matter being set for further hearing, neither the order submitted by Mr. O'Connor, nor any other order denying the Motion to Set Aside the Stipulation was entered by the court. After the matter was again heard, the court entered

an Order Denying the Motion for Reconsideration but overlooked the fact that a written Order Denying the Motion to Set Aside the Stipulation had never been entered.

Upon consideration of the foregoing matters, it is,

ORDERED AND ADJUDGED that the Motion of Defendants for an Order to Set Aside the Stipulation (Clerk's Docket -121, Record on Appeal Page 150) be, and the same hereby is denied; and it is further,

ORDERED AND ADJUDGED that said denial shall, in order to complete the record in this cause, be considered entered nunc pro tunc to January 25, 1983.

DONE AND ORDERED in Chambers at the Palm Beach County Courthouse, West Palm Beach, Florida, this 8th day of June, 1983, nunc pro tunc as of January 25, 1983.

/s/ Signed
WILLIAM C. OWEN, JR.
Circuit Court Judge

Copies furnished to:
Steven J. Greenwald, Esquire.
Robert Romani, Esquire.
Preston Mighdoll, Esquire.

APPENDIX "M"

FOURTH DISTRICT
COURT OF APPEAL'S DECISION

IN THE DISTRICT COURT OF APPEAL
OF THE STATE OF FLORIDA
FOURTH DISTRICT

JANUARY TERM 1984

NOT FINAL UNTIL TIME EXPIRES
TO FILE REHEARING PETITION
AND, IF FILED, DISPOSED OF.

CASE NO. 83-311

BAREFOOT MAILMAN LIMITED,
BAREFOOT MAILMAN MANAGEMENT COMPANY,
BAREFOOT MAILMAN OWNER'S ASSOCIATION,
INC., and CAXTON LIMITED,

Appellants,

v.

DONALD I. BARKHEIMER, II.,
PARK AVENUE INVESTMENT & DEVELOPMENT,
INC., etc., et al.,

Appellees.

CASE NO. 83-1004.

PARK AVENUE INVESTMENT & DEVELOPMENT,
INC., etc., et al.,

Appellants,

v.

DONALD I. BARKHEIMER, II., et al.,

Appellees.

Opinion filed May 9, 1984

Consolidated Appeals from the
Circuit Court for Palm Beach County;
W. C. Williams III and
William C. Owen, Jr., Judge.

Preston Mighdoll of Kohl, Springer,
Springer, Mighdoll & Salnick,
Palm Springs, for appellants
Barefoot Mailman and Caxton Limited.

Robert V. Romani of Farish, Farish & Romani,
West Palm Beach, for appellees
Donald I. Barkheimer, II, et al.

Hal P. Dekle, Tampa, and O'Connor, Bayler and Elliott,
Palm Beach, for Park Avenue Investments, Inc., et al.

PER CURIAM.

Affirmed. *See Gunn Plumbing, Inc. v. Dania Bank*, 252 So.2d 1 (Fla. 1971) and *Sherman v. Field Clinic*, 392 N.E. 2d 154 (Ill. App. 1979).

ANSTEAD, C.J., and GLICKSTEIN, J., concur.

WALDEN, J., dissents without opinion.

APPENDIX "N"

ORDER DENYING MOTION FOR REHEARING

IN THE DISTRICT COURT OF APPEAL
OF THE STATE OF FLORIDA
FOURTH DISTRICT

CASE NO. 83-311.

BAREFOOT MAILMAN LIMITED, et al.,

Appellants,

v.

DONALD I. BARKHEIMER, II, et al.,

Appellees.

CASE NO. 83-1004.

PARK AVENUE INVESTMENT & DEVELOPMENT, INC., etc., et al.,

Appellants,

v.

DONALD I. BARKHEIMER, II, et al.,

Appellees.

July 11, 1984

BY ORDER OF THE COURT:

ORDERED that the Motion for Rehearing and Motion for Rehearing *en banc* filed by Appellant, Park Avenue Investment, etc., et al., are denied as untimely.

ORDERED that the May 24, 1984 Motion for Rehearing and Clarification, filed by Appellants, Barefoot Mailman Limited, et al., is denied.

I hereby certify that the foregoing is a true copy of the original court order.

/s/ Signed
CLYDE L. HEATH,
CLERK

cc: Hal P. Dekle, Esq.
O'Connor, Bayler and Elliott
Preston Mighdoll, Esq.
Robert V. Romani, Esq.

cms

APPENDIX "O"

PETITION FOR CERTIORARI

IN THE SUPREME COURT
OF THE STATE OF FLORIDA

CASE NO:

PARK AVENUE INVESTMENT & DEVELOPMENT, INC., a Florida corporation, MARK LOSEE, RALPH SNELGROVE, DREW APGAR, and EVERETT HENSLEY, General Partners d/b/a BAREFOOT MAILMAN, LTD., a Florida limited partnership, BAREFOOT MAILMAN OWNERS ASSOCIATION, INC., a Florida non-profit organization, BAREFOOT MANAGEMENT COMPANY, a Florida corporation, CAXTON, LTD., a British Virgin Island corporation, and MARK LOSEE and DREW APGAR, individually,

Petitioners,

v.

DONALD I. BARKHEIMER, II, PEGGY A. BARKHEIMER, his wife, DONALD L. BARKHEIMER, G. LOUISE BARKHEIMER, his wife, HARRY RANKER, VIRGINIA RANKER, his wife, DENNIS REED, SANDRA REED, his wife, GENEVA L. BARKHEIMER, and JOSEPH D. FARISH, JR., and ROBERT V. ROMANI, d/b/a FARISH, FARISH & ROMANI,

Respondents.

PETITION FOR COMMON LAW CERTIORARI

Petitioners file this Petition for Common Law Certiorari directed to a Fourth District Court of Appeal's

decision dated May 9, 1984, rendered final by an order denying Motion for Rehearing dated July 11, 1984. The Petitioners have simultaneously filed a Notice of Appeal with the Fourth District Court of Appeal based upon the fact that the Fourth District's decision declares invalid a state statute. This Petition seeks review of a decision that is totally at odds with the public policy of the State and with Florida's Criminal Usury Statute, §687.071.

STATEMENT OF THE CASE AND FACTS

Plaintiffs (the "Lenders") loaned money to Defendants (the "Borrowers") at usurious interest rates. One promissory note was executed on February 20, 1981 by The Borrowers for $20,000, plus interest charged for 14 days in the amount of $3,800 for a total of $23,800 (A32). The effective interest rate for the transaction was 495.3% per annum (A32). The note was not repaid and a new note was executed on March 4, 1981 for the principle amount of $23,800 payable within 14 days with interest (labeled "profit") of $4,370 for a total of $28,170 (A32, 36). The effective interest rate was 478.7% per annum. The note was not repaid and a new note was executed on March 17, 1981 for $28,170 plus interest (labeled "profit") of $5,281.18 for a total of $33,551.18 (A33, 37). Therefore, on the $20,000 loan the interest charged from February 20, 1981 to March 31, 1981 was $13,551.18 (A32-33, 36-38). These loans are but examples of the many loans made to the Borrowers by the Lenders and now total $226,000. The interest on the loans ranged anywhere from 114% to 1,161% per annum.

The Lenders filed suit against the Borrowers for nonpayment of the promissory notes. During the course of that lawsuit the parties entered into a settlement as contained in a Stipulation, which set forth therein the amount owed

on each of the usurious notes, plus interest; and further set forth a payment schedule for payment of each of the usurious notes, plus interest (A11-17). The Stipulation also provided that repayment of the usurious notes and interest was secured by conveyances of time share units in the Barefoot Mailman Hotel and Resort (A11-17).

The Borrower failed to make payment as agreed to under the Stipulation and the Lender filed another law suit to compel delivery of the time-share units which had been conveyed in the Hotel and Resort (A1-10). The Borrowers raised as an affirmative defense that the underlying notes had charged usurious interest (A18). The Borrowers also filed a counterclaim against the Lenders to have the notes declared unenforceable as being usurious (A14-22). The Lenders moved to dismiss and strike the Borrowers' affirmative defenses and counterclaim alleging that the Borrowers had waived the right to rely upon usury as a defense by entering into the Stipulation (A23). The trial court granted the motion and struck the Borrowers' affirmative defenses and counterclaim (A24). The Lenders then filed a Motion for Summary Judgment based upon the Stipulation (A 25-26). In response, the Borrowers filed a Motion to Set Aside the Stipulation (A27).

The Borrowers also filed, in the original court action in which the Stipulation had been entered, a Motion to Set Aside the Stipulation on the ground that it was usurious and unenforceable under §687.071 F.S. which provides:

> (3) Unless otherwise specifically allowed by law, any person making an extension of credit to any person, who shall willfully and knowingly charge, take or receive interest thereon at a rate exceeding forty-five percent per annum or the

> equivalent rate for a longer or shorter period of time, whether directly or indirectly or conspire so to do, shall be guilty of a felony of the third degree, punishable as provided in Sec. 775.083, Sec. 775.083 or Sec. 775.084.
>
> * * * *
>
> (7) *No extension of credit made in violation of any of the provisions of this section shall be an enforceable debt in the courts of this state.*

The trial court subsequently denied the Borrowers' Motion to Set Aside the Stipulation in the action that was filed to enforce the Stipulation, granted the Lenders' Motion for Summary Judgment and entered Final Judgment thereon (A27-30).

In the original action on the notes the trial court likewise denied the Borrowers' Motion to Set Aside the Stipulation for the reason that (A42-43):

> ...irrespective of the usurious nature of the notes which formed the basis of the prior litigation, the written stipulation for settlement of that litigation constituted a new, independent and separate obligation in lieu and in place of the prior obligation, the effect of which was to eliminate any vice that was inherent in any of the prior and underlying obligations. In making that determination the court relied primarily on the case of *Gunn Plumbing, Inc. v. Dania Bank,* 252 So.2d 1 (Fla. 1971).

The Borrowers appealed to the Fourth District Court of Appeal. The Borrowers argued that *GUNN PLUMBING* had been decided by this Court prior to the enactment of §687.071 F.S. and therefore *GUNN PLUMBING* was no longer controlling. Rather, the public policy of this state,

as dictated by §687.071 (7) refused to allow a usurious loan to be enforced in the courts of this state. In affirming, the Fourth District not only departed from the essential requirements of law, but inherently held §687.071 F.S. invalid as applied to this case, citing to the *GUNN PLUMBING* decision. Judge Walden dissented.

It is Petitioners' position that the Fourth District's ruling departs from the essential requirements of law and therefore must be reversed by this court.

QUESTION PRESENTED

WHETHER THE FOURTH DISTRICT'S DECISION DEPARTS FROM THE ESSENTIAL REQUIREMENTS OF THE LAW.

ARGUMENT

In 1969 Florida's usury laws were amended to provide in §687.071(7) that an usurious loan would not be an enforceable debt in this state. The trial court and the Fourth District failed to apply the statute, and thus inherently held it invalid as applied to this case. Both courts relied upon the prior decision of this Court in *GUNN PLUMBING*. They should not have because the statute is controlling. The statute was enacted in 1969, and the notes involved in *GUNN PLUMBING* were executed prior to that date, so the statute was not applicable to, nor discussed in, *GUNN PLUMBING*. §687.071 encompasses the public policy of this state as of 1969. The statute protects citizens of this state who may not be in a position to protect themselves when dealing with lenders. It unequivocally provides that no usurious debt will be enforced in this state. This statutory provision which was passed to

strengthen Florida's usury laws is not subject to waiver.

However even if the *GUNN PLUMBING* decision is applied to the facts of this case, the Fourth District's decision here clearly constitutes an extreme departure from the essential requirements of law.

The *GUNN PLUMBING* decision cited *CORAL GABLES FIRST NATIONAL BANK V. CONSTRUCTORS OF FLORIDA, INC.*, 119 So.2d 741 (Fla. 1960) for the general rule that the usurious character of a contract must be determined as of the date of its inception, and if usurious at that time, no subsequent transactions will purge it. When such contracts are renewed by a new or substituted contract, usury follows and becomes a part of the latter contract, making it vulnerable to the defense of usury in like manner as the original contract. This is not true, however, when the old contract is abandoned and a new one is entered into *free from the vice of the old.* (pp. 746-47).

This Court in *GUNN PLUMBING* quoted its prior decision in *CARTER V. LEON LOAN AND FINANCE CO.*, 146 So. 664 (Fla. 1933):

> If the usurious factor in the first contract is carried into the new contract *in any form*, it is not purged of usury. The old obligation must be given up and abandoned, but, when this is done, and the borrower assents to a new or substituted contract in which he voluntarily agrees to pay the obligation with lawful interest, it is an act of justice forbidden by no principle of public policy, and will be enforced. (pp. 664-6). (Emphasis added).

The Court then stated that the issue before it in

GUNN PLUMBING was not whether every element of usury charged to exist in the original promissory note was abandoned by the subsequent contract of the parties. Rather, the issue before the Court was solely whether the affirmative defense of usury could be waived and, if so, whether such defense was waived by Defendants by virtue of the written stipulation.

The Court in *GUNN PLUMBING* reiterated that usury is a purely personal defense which could be waived. The Court then reviewed the settlement agreement entered into by the parties in that case after default on the usurious notes. The settlement agreement *specifically* provided that the defense of usury raised by the borrower was being withdrawn and that the borrowers admitted they had no defenses, counterclaims or set-offs, and admitted that they owed the lender the amount claimed. The Court concluded that by the particular language of the settlement agreement the borrowers had specifically waived their right to later rely upon the defense of usury.

This is not true in the present case. The Stipulation entered into by the parties in no way constituted a waiver of the Borrowers' defense of usury. Unlike *GUNN PLUMBING,* the Stipulation here does not address the Borrowers' defenses (A11-17). For that reason even under the *GUNN PLUMBING* rationale the Borrowers in the present case were not precluded from raising usury.

The controlling issue that must be answered here, which the Court in *GUNN PLUMBING* never reached, is whether the old usury was carried forward into the new contract in any form. It clearly was. The Stipulation entered into by the parties specifically set forth the amount owed each of the lenders *under the old usurious notes* (R11).

The Stipulation then merely set forth a new payment arrangement, but the old obligations continued. They were never abandoned. The old obligations were reiterated and incorporated into pages 1-2 of the Stipulation. Therefore, applying the dictates of this Court in *GUNN PLUMBING* to the facts of this case would require setting aside the Stipulation as being usurious. The new Stipulation was clearly tainted by the old usury.

This Court in *GUNN PLUMBING* also relied upon the fact that the borrowers took no affirmative action to rescind, reform or void the terms of the settlement stipulation. The Borrowers in the present case did so, by filing Motions to Set Aside the Stipulation in both the original action wherein the stipulation was entered, and in the later suit to enforce the Stipulation.

It is clear that the Fourth District's decision departs from the essential requirements of law. The Borrowers request this Court to consider this Petition along with their brief that will be submitted in a simultaneous appeal that is being filed. That appeal is based upon the fact that the Fourth District inherently held §687.071(7) invalid, as applied to this case. The brief in that case will be directed to that issue. The Borrowers further request this Court to consider this Petition as any other possible vehicle for lodging jurisdiction in this Court to review the Fourth District's decision.

I HEREBY CERTIFY that a copy of the foregoing has been mailed to: ROBERT V. ROMANI, ESQ., Denco Building, 316 First Street, West Palm Beach, FL 33401; and O'CONNOR, BAYLER AND ELLIOTT, 8895 North Military Trail, Suite 301-D, Palm Beach Gardens, FL 33410, this 9th day of AUGUST, 1984.

HAL P. DEKLE, ESQ.
Barnett Building
Tallahassee, FL 32301
and
SPRINGER, SPRINGER,
MIGHDOLL & SALNICK
3003 South Congress Avenue
Palm Springs, FL 33461
and
EDNA L. CARUSO, P.A.
Suite 4B-Barristers Bldg.
1615 Forum Place
West Palm Beach, FL 33401
305-686-8010

Attorneys for Petitioners

By: /s/ Signed
EDNA L. CARUSO

APPENDIX "P"

**ORDER DENYING
PETITION FOR CERTIORARI**

IN THE SUPREME COURT OF FLORIDA

WEDNESDAY, SEPTEMBER 5, 1984

CASE NO. 65,723

PARK AVENUE INVESTMENT & DEVELOPMENT, INC., ETC., ET AL.,

Petitioners,

vs.

DONALD I. BARKHEIMER, II, ET AL.,

Respondents.

The Petition for Common Law Certiorari is hereby denied.

OVERTON, ACTING C.J., ALDERMAN, McDONALD, EHRLICH and SHAW, JJ., Concur

A True Copy
TEST:
(SEAL)
/s/ Signed
Sid J. White
Clerk Supreme Court

C
cc: Edna L. Caruso, Esquire
Hal P. Dekle, Esquire
Springer, Springer, Mighdoll
& Salnick
Robert V. Romani, Esquire
O'Connor, Bayler & Elliott

APPENDIX "Q"

NOTICE OF APPEAL

IN THE DISTRICT COURT OF APPEAL
OF THE STATE OF FLORIDA
FOURTH DISTRICT

JANUARY TERM 1984

CASE NO. 83-311

BAREFOOT MAILMAN LIMITED,
BAREFOOT MAILMAN MANAGEMENT COMPANY,
BAREFOOT MAILMAN OWNER'S ASSOCIATION,
INC., and CAXTON LIMITED,

Appellants,

v.

DONALD I. BARKHEIMER, II.,
PARK AVENUE INVESTMENT & DEVELOPMENT,
INC., etc., et al.,

Appellees.

CASE NO. 83-1004

PARK AVENUE INVESTMENT & DEVELOPMENT,
INC., etc., et al.,

Appellants,

v.

DONALD I. BARKHEIMER, II., et al.,

Appellees.

NOTICE OF APPEAL

NOTICE IS HEREBY GIVEN that Appellant appeals to the Florida Supreme Court the decision of this Court dated May 9, 1984 rendered final by the Court's Order of July 11, 1984 denying Appellant's Motion for Rehearings. The nature of the Order is an Order which declares invalid a State Statute.

I HEREBY CERTIFY that a copy of the foregoing has been mailed to: ROBERT V. ROMANI, ESQ., Denco Building, 316 First Street, West Palm Beach, FL 33401; and O'CONNOR, BAYLER AND ELLIOTT, 8895 North Military Trail, Suite 301-D, Palm Beach Gardens, FL 33410, this 9th day of AUGUST, 1984.

HAL P. DEKLE, ESQ.
808 Landmark Bank Bldg.
412 Madison Street
Tampa, FL 33602
and
SPRINGER, SPRINGER,
MIGHDOLL & SALNICK
3003 South Congress Avenue
Palm Springs, FL 33461
and
EDNA L. CARUSO, P.A.
Suite 4B-Barristers Bldg.
1615 Forum Place
West Palm Beach, FL 33401
(305) 686-8010

Attorneys for Petitioners

By: /s/ Signed
EDNA L. CARUSO

APPENDIX "R"

ORDER DISMISSING APPEAL SUBJECT TO REINSTATEMENT

IN THE SUPREME COURT OF FLORIDA

MONDAY, AUGUST 13, 1984

CASE NO. 65,729

District Court of Appeal, 4th District
Nos. 83-311 & 83-1004

BAREFOOT MAILMAN LTD., ET AL.,

Appellants,

vs.

DONALD I. BARKHEIMER, II, ET AL.,

Appellees.

It appearing to the Court that the District Court of Appeal, Fourth District, did not declare *invalid* a State Statute or a provision of the State Constitution, and that, therefore, it is without jurisdiction, this appeal is hereby dismissed subject to reinstatement if jurisdiction is established on proper motion *filed* within fifteen (15) days from the date of this order. See Article V, Section 3(h)(1), Florida Constitution.

A True Copy
TEST:
(SEAL)
Sid J. White
Clerk Supreme Court

C
cc: Hon. Clyde L. Heath, Clerk
Hon. John B. Dunkle, Clerk
Hon. William C. Williams, III, Judge

By: /s/ Signed
Deputy Clerk

Hon. William C. Owen, Jr., Judge

Edna L. Caruso, Esquire
Hal P. Dekle, Esquire
Springer, Springer, Mighdoll & Salnick
Robert V. Romani, Esquire
O'Connor, Bayler & Elliott

APPENDIX "S"

MOTION FOR REINSTATEMENT

IN THE SUPREME COURT
OF THE STATE OF FLORIDA

CASE NO: 65,729

PARK AVENUE INVESTMENT & DEVELOPMENT, INC., a Florida corporation, MARK LOSEE, RALPH SNELGROVE, DREW APGAR, and EVERETT HENSLEY, General Partners d/b/a BAREFOOT MAILMAN, LTD., a Florida limited partnership, BAREFOOT MAILMAN OWNERS ASSOCIATION, INC., a Florida non-profit organization, BAREFOOT MANAGEMENT COMPANY, a Florida corporation, CAXTON, LTD., a British Virgin Island corporation, and MARK LOSEE and DREW APGAR, individually,

Appellants,

v.

DONALD I. BARKHEIMER, II, PEGGY A. BARKHEIMER, his wife, DONALD L. BARKHEIMER, G. LOUISE BARKHEIMER, his wife, HARRY RANKER, VIRGINIA RANKER, his wife, DENNIS REED, SANDRA REED, his wife, GENEVA L. BARKHEIMER, and JOSEPH D. FARISH, JR., and ROBERT V. ROMANI, d/b/a FARISH, FARISH & ROMANI,

Appellees.

MOTION FOR REINSTATEMENT

Appellants file this Motion for Reinstatement of their appeal pursuant to this Court's August 13, 1984

Order. Appellants seek to demonstrate to the Court that the Fourth District did declare invalid Florida Statute §687.071 and therefore this Court has jurisdiction to hear this appeal.

FACTS

Plaintiffs (the "Lenders") loaned money to Defendants (the "Borrowers") at usurious interest rates. One promissory note was executed on February 20, 1981 by The Borrowers for $20,000, plus interest charged for 14 days in the amount of $3,800 for a total of $23,800 (A32). The effective interest rate for the transaction was 495.3% per annum (A32). The note was not repaid and a new note was executed on March 4, 1981 for the principle amount of $23,800 payable within 14 days with interest (labeled "profit") of $4,370 for a total of $28,170 (A32, 36). The effective interest rate was 478.7% per annum. The note was not repaid and a new note was executed on March 17, 1981 for $28,170 plus interest (labeled "profit") of $5,281.18 for a total of $33,551.18 (A33, 37). Therefore, on the $20,000 loan the interest charged from February 20, 1981 to March 31, 1981 was $13,551.18 (A32-33, 36-38). These loans are but examples of the many loans made to the Borrowers by the Lenders and which now total $226,000. The interest on the loans ranged anywhere from 114% to 1,161% per annum.

The Lenders filed suit against the Borrowers for non-payment of the promissory notes. During the course of that lawsuit the parties entered into a settlement as contained in a Stipulation, which set forth therein the amount owed on each of the usurious notes, plus interest; and further set forth a payment schedule for payment of the total of the usurious notes, plus interest (A11-17). The Stipulation also provided that repayment of the usurious notes and interest

was secured by conveyances of time share units in the Barefoot Mailman Hotel and Resort (A11-17).

The Borrower failed to make payment as agreed to under the Stipulation and the Lender filed another law suit to compel delivery of the time-share units which had been conveyed (A1-10). The Borrowers raised as an affirmative defense that the underlying notes had charged usurious interest (A18). The Borrowers also filed a counterclaim against the Lenders to have the notes declared unenforceable as being usurious (A14-22). The Lenders moved to dismiss and strike the Borrowers' affirmative defenses and counterclaim alleging that the Borrowers had waived the right to rely upon usury as a defense by entering into the Stipulation (A23). The trial court granted the motion and struck the Borrowers' affirmative defenses and counterclaim (A24). The Lenders then filed a Motion for Summary Judgment based upon the Stipulation (A25-26). In response, the Borrowers filed a Motion to Set Aside the Stipulation (A27).

The Borrowers also filed, in the original court action in which the Stipulation had been entered, a Motion to Set Aside the Stipulation on the ground that it was usurious and unenforceable under §687.071 F.S. which provides:

> (3) Unless otherwise specifically allowed by law, any person making an extension of credit to any person, who shall willfully and knowingly charge, take or receive interest thereon at a rate exceeding forty-five percent per annum or the equivalent rate for a longer or shorter period of time, whether directly or indirectly or conspire so to do, shall be guilty of a felony of the third degree, punishable as provided in Sec. 775.083, Sec. 775.083 or Sec. 775.084.

* * * *

> (7) *No extension of credit made in violation of any of the provisions of this section shall be an enforceable debt in the courts of this state.*

The trial court subsequently denied the Borrowers' Motion to Set Aside the Stipulation in the action that was filed to enforce the Stipulation, granted the Lenders' Motion for Summary Judgment and entered Final Judgment thereon (A27-30).

In the original action on the notes the trial court likewise denied the Borrowers' Motion to Set Aside the Stipulation for the reason that (A42-43):

> ...irrespective of the usurious nature of the notes which formed the basis of the prior litigation, the written stipulation for settlement of that litigation constituted a new, independent and separate obligation in lieu and in place of the prior obligation, the effect of which was to eliminate any vice that was inherent in any of the prior and underlying obligations. In making that determination the court relied primarily on the case of *Gunn Plumbing, Inc. v. Dania Bank,* 252 So.2d 1 (Fla. 1971).

The Borrowers appealed to the Fourth District Court of Appeal. The Borrowers argued that *GUNN PLUMBING* had been decided by this Court prior to the enactment of §687.071 F.S. and therefore *GUNN PLUMBING* was no longer controlling. Rather, the public policy of this state, as dictated by §687.071 (7) refused to allow a usurious loan to be enforced in the courts of this state. In affirming, the Fourth District not only departed from the essential requirements of law, but inherently held §687.071 F.S. invalid as applied to this case, citing to the *GUNN PLUMBING* decision. Judge Walden dissented.

QUESTION PRESENTED

WHETHER THE FOURTH DISTRICT'S DECISION RELYING UPON GUNN PLUMBING HELD §687.071 INVALID.

Prior to the 1980 amendment to Article V, the non-discretionary jurisdiction of this Court included appeals from decisions of district courts of appeal initially and directly passing on the validity of a state statute. As a result of the 1980 Amendment to Article V §3(b)(1) now provides that this Court has jurisdiction to review, by way of appeal, decisions of District Courts of Appeal declaring invalid a state statute. Appellant has been unable to find any post 1980 cases discussing what type of district court activity is sufficient to trigger the invalidity provision. There are two areas of concern. First, is whether a declaration of invalidity "as applied" is sufficient to provide jurisdiction. Cases prior to the 1980 Amendment held that it did. In *SNEDEKER V. VERNMAR, LTD.*, 151 So.2d 439 (Fla. 1963) this Court accepted jurisdiction in a case in which the statute under review was held to be unconstitutional only as applied to the plaintiffs. The court explained:

> ...adjudication...of validity or invalidity in every such case is a decision passing upon the validity of the statute as applied to the facts at bar..., unless, of course, the court ultimately concludes that the terms of the law can be construed as inapplicable to such facts, in which event the constitutional issue is not decided.

It is submitted that invalidity "as applied" would still be sufficient, post 1980, to meet the jurisdictional requirement of this Court. Appellant has been unable to find any post-1980 cases addressing this issue. However, as

recently as 1979, this Court did accept jurisdiction where there was a challenge to the validity of a state, "as applied". In *CROSS V. STATE*, 374 So.2d 519 (Fla. 1979) a defendant claimed that a statute was invalid, not on its face, but as applied to the facts of his particular case. The trial court did not agree that the statute was unconstitutional as applied to the defendant and he was convicted. Upon appeal to this Court (under pre-1980 amendment justification) this Court accepted jurisdiction and upheld the constitutionality of the statute "as applied to *CROSS*".

Under the 1980 amendment there is no language which requires that the district court hold the statute facially invalid in order for this Court to have jurisdiction. Article V (3)(b)(1) only requires that the District Court's decision declare invalid a state statute. A District Court decision can declare a state statute facially invalid or invalid as applied. It is submitted that either falls within the ambit of Article V §3 (b)(1).

The second area of concern is whether the inherency doctrine still applies. Pre-1980 it was not necessary that a written opinion or order expressly rule on the validity of a state statute. An implied or inherent ruling on its validity was sufficient to meet the jurisdictional requirement of this Court. *ROJAS V. STATE*, 288 So.2d 234 (Fla. 1973); *DYKMAN V. STATE*, 294 So.2d 633 (Fla. 1973); *OGLE V. PEPIN*, 273 So.2d 391 (Fla. 1973); *CITY OF LONG BEACH RESORT V. COLLINS*, 261 So.2d 498 (Fla. 1972); *UNITED YACHT BROKERS, INC. V. GILLESPIE*, 353 So.2d 574 (Fla.4thDCA 1977).

In *BUCKMAN V. STATE BOARD OF ACCOUNTING*, 262 So.2d 188 (Fla. 1972) this Court held that the District Court's act of declining, without opinion other

than citations to another District Court case, to grant common law certiorari effectively constituted a passing on the validity of a statute so as to result in appellate jurisdiction in the Florida Supreme Court.

As recent as 1981 this Court has applied the inherency doctrine to a ruling on the validity of a state statute, although under pre-1980 amendment jurisdiction. In *AGULAR V. COMMUNITY GENERAL HOSPITAL*, 396 So.2d 149 (Fla. 1981) this Court held that it had jurisdiction over the plaintiffs' appeal in a medical malpractice action where the circuit court "inherently ruled" on the constitutional validity of the statute governing jurisdiction of mediation panels.

Prior to the 1980 amendment to the Constitution, the Constitutional language specifically provided that the District Court was required to *directly* pass upon the validity of a state statute in order for this Court to have appellate jurisdiction. Regardless of the use of the term "direct", this Court found that the requirement was met if the District Court "inherently" ruled on a statute's validity. Under the post-1980 amendment, the terminology "direct" has been eliminated. Now all that is required is that the District Court declare invalid a state statute. A *direct* declaration in that regard is no longer required. With the elimination of this terminology it can be concluded there was an intent to incorporate the "inherency" doctrine, so that either an express or inherent declaration of invalidity is sufficient.

That this was the intent is evidenced by the fact that within other provisions of the constitutional amendment the terminology "direct" has been retained. For example, in Article V §3(b)(3), conflict jurisdiction requires a decision

of this Court which "expressly and directly" conflicts with another decision. In contrast, there is no requirement of a direct or express declaration of invalidity in Article V §3(b)(1). Therefore, it can be concluded that the inherency doctrine still exists.

As applied to the present case, it is clear that the Fourth District inherently held §687.071(7) invalid as applied to Plaintiffs. In 1969 Florida's usury laws were amended to provide in §687.071(7) that an usurious loan would not be an enforceable debt in this state. The trial court and the Fourth District failed to apply the statute, and thus inherently held it invalid as applied to this case. Both courts relied upon the prior decision of this Court in *GUNN PLUMBING*. They should not have because the statute is controlling. The statute was enacted in 1969, and the notes involved in *GUNN PLUMBING* were executed prior to that date, so §687.071 was not applicable to, nor discussed in, *GUNN PLUMBING*. §687.071 encompasses the public policy of this state as of 1969. The statute protects citizens of this state who may not be in a position to protect themselves when dealing with lenders. It unequivocally provides that no usurious debt will be enforced in this state. This statutory provision which was passed to strengthen Florida's usury laws is not subject to waiver.

The trial court and District Court *necessarily* held §687.071(7) invalid because that is the only way the Court could have relied upon *GUNN PLUMBING* to the complete exclusion of §687.071. See *DAVIS V. DEPARTMENT OF H.R.S.*, 390 So.2d 1194 (Fla. 1980). The *GUNN PLUMBING* decision cited *CORAL GABLES FIRST NATIONAL BANK V. CONSTRUCTORS OF FLORIDA, INC.*, 119 So.2d 741 (Fla. 1960) for the general rule that the usurious character of a contract must be determined as of

the date of its inception, and if usurious at that time, no subsequent transactions would purge it; that when such contracts were renewed by a new or substituted contract, usury followed and became a part of the latter contract, making it vulnerable to the defense of usury in like manner as the original contract; but that this was not true, however, when the old contract was abandoned and a new one was entered into *free from the vice of the old.* (pp. 746-47).

This Court in *GUNN PLUMBING* quoted its prior decision in *CARTER V. LEON LOAN AND FINANCE CO.*, 146 So. 664 (Fla. 1933):

> If the usurious factor in the first contract is carried into the new contract *in any form*, it is not purged of usury. The old obligation must be given up and abandoned, but, when this is done, and the borrower assents to a new or substituted contract in which he voluntarily agrees to pay the obligation with lawful interest, it is an act of justice forbidden by no principle of public policy, and will be enforced. (pp. 664-6). (Emphasis added).

The Court then stated that the issue before it in *GUNN PLUMBING* was *not* whether every element of usury charged to exist in the original promissory note was abandoned by the subsequent contract of the parties. Rather, the issue before the Court was *solely* whether the affirmative defense of usury could be waived and, if so, whether such defense was waived by the defendants by virtue of the written stipulation they had voluntarily entered into.

The Court in *GUNN PLUMBING* reiterated that usury is a purely personal defense which could be waived.

The Court then reviewed the settlement agreement entered into by the parties in that case after default on the usurious notes. The settlement agreement *specifically* provided that the defense of usury raised by the borrower was being withdrawn, admitted that the borrowers had no defenses, counterclaims or set-offs, and admitted that they owed the lender the amount claimed. This Court concluded that by the particular language of the settlement agreement the borrowers had specifically waived their right to later rely upon the defense of usury.

GUNN PLUMBING would not require the same result in the present case for several reasons. First and most important is the fact that §687.071(7) is now in existence and would prevent the enforcement of the Stipulation entered into in this case. The only issue under §687.071 is whether the debt is based upon usurious interest. If so, it is unenforceable in this State.

Secondly, the Stipulation entered into by the parties in the present case in no way constituted a waiver of the Borrowers' defense of usury. Unlike *GUNN PLUMBING*, the Stipulation here does not address the Borrowers' defenses (A11-17). For that reason, even under the *GUNN PLUMBING* rationale the Borrowers in the present case were not precluded from raising usury.

The controlling issue that must be answered here, and which is controlled by §687.071, and which the Court in *GUNN PLUMBING* never reached, is whether the old usury was carried forward into the new contract in any form. It clearly was. A perusal of the Stipulation entered into by the parties clearly demonstrates that is specifically set forth the amount owed each of the lenders *under the old usurious notes* (R11). The Stipulation then merely set forth

a new payment arrangement, *but the old obligations continued*. They were never abandoned. The old obligations were reiterated and incorporated into pages 1-2 of the Stipulation. Therefore, the new Stipulation was tainted by the old usury. For that reason, §687.071 would require setting aside the Stipulation as being usurious. By reaching the result the Court did in this case, it could only have inherently held §687.071 invalid as applied to these facts.

Accordingly, Appellants request this Court to reinstate this appeal and allow briefs to be filed on the merits.

I HEREBY CERTIFY that a copy of the foregoing has been mailed to: ROBERT V. ROMANI, ESQ., Denco Building, 316 First Street, West Palm Beach, FL 33401; and O'CONNOR, BAYLER AND ELLIOTT, 8895 North Military Trail, Suite 301-D, Palm Beach Gardens, FL 33410, this 24th day of AUGUST, 1984.

HAL P. DEKLE, ESQ.
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Tallahassee, FL 32301
and
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MIGHDOLL & SALNICK
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and
EDNA L. CARUSO, P.A.
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305-686-8010
Attorneys for Petitioners

By: /s/ Signed
EDNA L. CARUSO

APPENDIX "T"

RESPONSE

IN THE SUPREME COURT
OF THE STATE OF FLORIDA

CASE NO: 65,729

PARK AVENUE INVESTMENT & DEVELOPMENT, INC., a Florida corporation, MARK LOSEE, RALPH SNELGROVE, DREW APGAR, and EVERETT HENSLEY, General Partners d/b/a BAREFOOT MAILMAN, LTD., a Florida limited partnership, BAREFOOT MAILMAN OWNERS ASSOCIATION, INC., a Florida non-profit organization, BAREFOOT MANAGEMENT COMPANY, a Florida corporation, CAXTON, LTD., a British Virgin Island corporation, and MARK LOSEE and DREW APGAR, individually,

Appellants,

v.

DONALD I. BARKHEIMER, II, PEGGY A. BARKHEIMER, his wife, DONALD L. BARKHEIMER, G. LOUISE BARKHEIMER, his wife, HARRY RANKER, VIRGINIA RANKER, his wife, DENNIS REED, SANDRA REED, his wife, GENEVA L. BARKHEIMER, and JOSEPH D. FARISH, JR., and ROBERT V. ROMANI, d/b/a FARISH, FARISH & ROMANI,

Appellees.

RESPONSE TO MOTION FOR REINSTATEMENT

Respondents respond to Petitioners' Motion for Reinstatement as to PARK AVENUE INVESTMENT &

DEVELOPMENT, INC. MARK LOSEE and DREW APGAR, as follows:

STATEMENT OF THE FACTS

DREW APGAR, an attorney, and MARK LOSEE, a former bank officer, formed PARK AVENUE INVESTMENT & DEVELOPMENT, INC., to develop and convert oceanfront buildings into time-share resorts. The purpose of this Florida corporation was to solicit funds for the conversion of the Barefoot Mailman Hotel in Broward County into the Barefoot Mailman Time-Share Resort. (A-1 through 102, Deposition of Drew Apgar, page 4, line 25, page 6, line 10, and page 71, line 13 through 24).

On or about November 14, 1979, Barefoot Mailman, Ltd., purchased the Barefoot Mailman Hotel for the purpose of converting it into time-share units for sale. Barefoot Mailman, Ltd., transferred this real property to the Barefoot Mailman Owners Association, Inc., on May 20, 1980. This transfer was pursuant to an agreement between Barefoot Mailman, Ltd., and Barefoot Mailman Owners Association, Inc. whereby Barefoot Mailman, Ltd. would develop the Barefoot Mailman Hotel and receive the net sales of the time share units converted. (A-103 through 165, Mark Losee's deposition, page 37, line 18 through 24).

Being that the Barkheimers were clients of Drew Apgar, Drew Apgar solicited them and the other appellees to invest in Park Avenue Investment & Development, Inc. under a profit sharing plan. (A-1 through 102, deposition of Drew Apgar, page 6, line 14 through 19). Park Avenue Investment and Development, Inc. defaulted under this profit sharing plan and executed Promissory Notes to the Appellees for the deficiency due under the profit sharing

investment plan. Park Avenue Investment & Development, Inc. defaulted under these Promissory Notes and five consecutive lawsuits commencing with Case No. 81-2952CA(L)01(J), were brought by the Plaintiffs/Appellees in the Circuit Court of Palm Beach County to recover under these Promissory Notes. (A-1 through 102, deposition of Drew Apgar, page 6, line 20 through 23), (A-192 through 196, a copy of the Complaint filed in one of these five lawsuits).

On September 17, 1981, a Stipulation was entered into between the Appellees and Park Avenue Investment & Development, Inc., Mark Losee, and Drew Apgar, for the settlement of these five consecutive lawsuits. (A-176 through 182) This Stipulation was expressly accepted by the parties, "...as a resolution of the issues necessarily involved in the captioned cases..." It should also be particularly noted that the figures listed in Section 1 of the Stipulation as the total claim of the Plaintiffs were supplied by the Defendant/Appellants and were not inserted at the suggestion of the Plaintiffs/Appellees.

As part of the aforesaid Stipulation, Park Avenue Investment & Development, Inc. agreed to pay money they admitted was owed to the Appellees and secured the repayment of this money by the conveyance of time share units in the Barefoot Mailman Resort. (A-103 through 165, deposition of Mark Losee, page 16, line 17 through page 18, line 1). Park Avenue Investment & Development, Inc. failed to make any of the payments agreed to under said Stipulation. (A-1 through 102, deposition of Drew Apgar, page 40, line 5 through 9). Pursuant to the terms of the Stipulation, in the event that the Defendants defaulted under the terms of the Stipulation, the units conveyed to the Appellees would become effective as satisfaction of the

indebtedness agreed to in the Stipulation. (A-176 through 182, see paragraph 5 of the Stipulation and A-1 through 165, deposition of Drew Apgar, page 40, line 10 through 17).

Vacation share conveyances were then properly executed to the Appellees by a partner of the Barefoot Mailman, Ltd., and an officer of the Barefoot Mailman Owners Association, Inc.

On or about February 15, 1982, Barefoot Management Company was formed for the purpose of managing the Barefoot Mailman Time Share Resort. Defendants have demanded that the Appellees deliver the unit weeks conveyed to them and Barefoot Management Company has denied the Appellees entry to these units.

As the result of these actions by the Appellants, on June 11, 1982, and July 8, 1982, respectively, the Appellees filed a Complaint and Amendment to Complaint in companion case No. 82-3158CA(L)01 E against the Defendants for declaratory relief, injunctive relief and monetary damages. (A-166-174, and A-175-177).

In this companion case, Defendants, Park Avenue Investment & Development, Inc., Drew Apgar and Mark Losee, answered the Appellees' Complaint and alleged affirmative defenses that the Stipulation in question constituted a usurious loan. On October 21, 1982, Honorable Jack H. Cook granted the Appellees' Motion to Strike the aforesaid affirmative defenses of said Defendants. (A-185).

On December 22, 1982, in the same companion case, the Defendants made a Motion to set aside the Stipulation in question on the same grounds they raised in their earlier

Motion, i.e., that it was usurious and unenforcable. On June 8, 1983, Honorable William C. Owen, Jr., entered a nunc pro tunc Order denying the Defendants' Motion to set aside the Stipulation (A-186-187) and on April 15, 1983, Judge Owen entered an Order denying the Defendants' Motion for Reconsideration of this Order (A-188). These two Orders were the basis of the Appellants' Appeal to the Fourth District Court of Appeal. In its Opinion filed May 9, 1984, the Fourth District Court of Appeal affirmed the decisions of the lower Court. (A-189). On July 11, 1984, the Fourth District Court of Appeal denied Appellants' Motion for Rehearing. (A-190). Subsequently, the Appellants filed this Motion for Reinstatement before this Honorable Court.

ARGUMENT

Appellees do not contest whether a declaration of invalidity "as applied" is sufficient to provide jurisdiction or whether the inherency doctrine applies. A decision as to such by this Court is rendered unnecessary since the statute concerned isn't determinative of the case at bar anyway. Even the case relied on so heavily by the Appellants, *Snedekar v. Vernmar, Ltd.*, 151 So 2d 439 (Fla.1963), 441-2, admits this proposition:

> "The adjudication, however, of validity or invalidity in every such case is a decision passing upon the validity of the statute as applied to the facts at bar, unless, of course, the Court ultimately concludes that the terms of the law can be construed as inapplicable to such facts, in which event the constitutional issue is not decided."

Even more recently, this Court in the 1980 decision

of *Davis vs. Department of Health and Rehabilitative Services*, 390 So 2d 1194, (Fla.1980), said that "[e]ven under the inherency doctrine, the constitutional challenge must have been to a controlling statute and the decision as to the statute's validity necessary to the determination of the case." However, it should be noted that the most recent decisions involving the inherency doctrine have carried strong dissents suggesting a re-evaluation as to the application of the doctrine. See *Cross vs. State*, 374 So.2d 519 (Fla.1979) and *Aquilar vs. Community General Hospital*, 396 So.2d 149 (Fla.1981).

Both the Fourth District Court of Appeal and the lower Court based their decisions on the prior Supreme Court case of *Gunn Plumbing, Inc. vs. Dania Bank*, 252 So.2d. 1, (Fla.1971). In *Gunn Plumbing, Inc.*, the Defendants executed and delivered a Promissory Note to the Plaintiff. This Note was not paid at maturity and the Plaintiff then accepted a renewal Promissory Note. When the renewal Note was not paid at its maturity, the Plaintiff instituted suit against the Defendants and the Defendants interposed the defense of usury to this action. This suit was later settled between the parties pursuant to a written stipulation. In this stipulation, the defendants withdrew their civil defenses and admitted that they owed the Plaintiff a certain sum of money, but the Plaintiff agreed to accept a lesser amount of indebtedness.

In *Gunn Plumbing, Inc.*, this Court acknowledged its earlier opinion in *Carter vs. Leon Loan & Finance Co.*, 146 So 664 (Fla.1933) wherein it held that if a contract is usurious at the time of its inception, no subsequent transaction will purge the original transaction of its usurious nature unless the subsequent transaction gives up and abandons every element of usury charged to exist in the

first loan contract. However, in *Gunn Plumbing, Inc.*, this Court held that it was not its area to determine whether or not every element of usury charged to exist in the original contract was abandoned by the subsequent contract between the parties because "...Usury is purely a personal defense created by statute for the protection of borrowers and, therefore, any borrower may waive his right to claim the benefit of such statute." *Gunn Plumbing, Inc.* at 4.

As was noted by this Court: "the usury statute in this State does not have the effect of invalidating contracts for interest at a rate higher than the statutory maximum, but only accords to the obligor the privilege of setting up, or waiving, affirmative defenses of usury in respect to such contracts." *Gunn Plumbing, Inc.* at 4. Relying on this reasoning, this Court in that case held that the District Court of Appeal was correct in holding that the defense of usury had been waived by the defendants when they entered into the joint stipulation with the Plaintiff. Just as in the *Gunn Plumbing, Inc.* case, in the instant case appellants waived any defense of usury they might have had to the original Note executed and delivered to the Appellees when they entered into the joint stipulation in question. Although the Appellants would have this Court believe otherwise, such waiver language does exist in the stipulation between the parties. In this stipulation it is provided that, "...the following agreements shall be accepted by the parties *as a resolution of the issues necessarily involved in the captioned cases and any judgments flowing therefrom.*" (emphasis added; see stipulation attached to Appellees' appendix A-178 through 184). It should be noted that two Circuit Court Judges, Judge Owen and Judge Cook, as well as the Fourth District Court of Appeal, agreed that such language in the stipulation constituted a waiver of all of the defenses that Appellants may have had, including usury.

In the Appellants' Motion, opposing counsel has raised tactical arguments with the hope of convincing this Court that the *Gunn Plumbing, Inc.* case is not controlling in the instant case. First, the appellants argue that since Florida Statute §687.071 was enacted after the stipulation entered into the *Gunn Plumbing, Inc.* case, this statute supercedes and impliedly overrules this Court's holding in *Gunn Plumbing, Inc.* The Appellees respectfully submit to this Court that the enactment of Florida Statute §687.071 does not affect the holding in the *Gunn Plumbing, Inc.* case. This Court's decision of *In re: Estate of Blankenship,* 122 So 2d. 466 (Fla.1960), 470, stated that:

> "It does not follow as a matter of course that a court decision interpreting a statute is rendered inapplicable ipso facto by a subsequent amendment to the statute. The effect of the decision as binding precedent must in each instance be determined by the nature and effect of the amendment to the statute as well as by the breadth of the court decision and the questions decided in it, as those questions may be applicable to the statute after amendment."

Appellants are impressed by the language contained in paragraphs 7 of §687.071 which states: "(7) No extension of credit made in violation of any other provisions of this section shall be an enforcable debt in the Court of this State."

One should note, however, that §687.07 Florida Statutes (1965), which was the statute in effect at the time the stipulation was entered into in the *Gunn Plumbing, Inc.* case had a provision similar to that found in §687.071. In §687.07, Florida Statutes (1965), which is attached to the Appellees' appendix at A-191, provides in relevant part

that if the lender shall violate that criminal usury statute, the lender: "...shall forfeit the entire sum, both principal and interest, to the party charging such usurious interest, and shall be deemed guilty of a misdemeanor,...". Since the lender forfeits his entire principal and interest under §687.07, this has the same effect as the lender being unable to enforce his debt in the Courts pursuant to §687.071. Therefore, since this Court was charged with the knowledge of §687.07 at the time it decided the *Gunn Plumbing, Inc.* case, it is the Appellees' position that the enactment of §687.071 in no way affected this Court's decision in that case.

The Appellees also assert that the instant case is not a situation where you are dealing with consumer loan between an unknowledgable borrower and a shrewd, unconscionable lender. Initially, this was an investment situation wherein the borrowing corporations were acting through two other officers and/or directors who were a former officer and a lawyer; whereas the investors/lenders were average consumers. Therefore, since the borrowers had the superior knowledge in this case, this is not the type of transaction which the usury statutes were enacted to prohibit. This is not a case where an innocent person was exposed to the device of a stipulation imposed by the grasping hand of the greedy lender as the Appellants would have this Court believe.

Appellees would again point out that the stipulation in question was entered into to settle their lawsuit against the Appellants and settlement agreements are binding upon the parties and upon the Court and they are highly favored by the Courts. *Dorson v. Dorson,* 393 So.2d, 632 (Fla.4th DCA 1981). In *Gunn Plumbing, Inc.,* this Court held that:

> "This Court is committed to the rule that it not only approves but favors stipulations and agreements on the part of litigants and counsel designed to simplify, shorten or settle litigation and save cost to the parties, and the time of the Court, and when such stipulations or agreements are entered into between parties, litigants or their counsel, the same should be enforced by the Court, unless good cause is shown to the contrary." *Gunn Plumbing, Inc.* at 4.

Therefore, as alluded to in the quote above and as clearly stated by this Court in *State vs. Bruno*, 104 So.2d 588 (Fla.1958), 590, "[t]he burden is on the Appellant to show that this Court has jurisdiction to act in this cause which it presents." The Appellees contend, however, that the Appellants have not carried their burden. All the Appellants have merely done is to allege that such invalidation occurred in the District Court of Appeal's decision, without proving such.

> "The fact that a Complaint prays for a decree directly passing on the validity of numerous State statutes and construing alleged controlling provisions of the Florida constitution does not ipso facto mean that any decree entered in such a cause has directly passed on the validity of a State statute or construed a contolling provision of the Constitution." *Green vs. Peters*, 140 So.2d 601 (Fla.2d DCA 1962), at 602.

Additionally, "it is fundamental that an Order or decree comes to the Appellate Court clothed with the presumption of correctness, and before reversal of an Order or decree may be had, the burden rests on Appellant to clearly demonstrate error." *Southern National Bank of Fort Walton Beach vs. Young*, 142 So 2d 788 (Fla.1st DCA 1962), at 789.

As the argument above points out, the Fourth District Court of Appeal did not err in its ruling. The decision was based on this Court's decision of *Gunn Plumbing, Inc.* Therefore, the statute argued never comes into play whatsoever. The stipulation entered into was valid and as such, the Fourth District Court of Appeal was correct in affirming the lower Court's Order.

As pointed out by this Court in *Mournier vs. State*, 178 So 2d 714, (Fla.1965), the Supreme Court is compelled to dispose of the appeal without considering the validity of the aforementioned statute, if the case can be dismissed on any other ground. Clearly such a situation exists with the case at bar.

CONCLUSION

Therefore, it is the Appellees' contention that this Court is without jurisdiction to hear the present Motion for Reinstatement and that the basis for invoking jurisdiction pursuant to the Florida Constitution, Article V, Section 3 (b)(1) has not been met. Accordingly, Appellees request this Court to decline reinstatement.

Respectfully submitted,

/s/ Signed

Robert V. Romani
Of Counsel

FARISH, FARISH & ROMANI
P. O. Box 3887
West Palm Beach, FL 33402
Attorneys for Appellees

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Response to Motion for Reinstatement of Appellees on Case No. 65,729 and Appendix thereto has been furnished O'Connor, Bayler and Elliott, 8895 No. Military Trail, Suite 301D, Palm Beach Gardens, FL 33410; and Edna L. Caruso, Esq., P.A., Suite 4-B, Barristers Bldg., 615 Forum Place, West Palm Beach, Florida, 33401; and Hal P. Dekle, Esq., 412 Madison Street, Suite 808, Tampa, FL 33602, Attorneys for Appellants, by mail, this 10th day of September, 1984.

/s/ Signed
Robert V. Romani
Attorney

APPENDIX "U"

REPLY

IN THE SUPREME COURT
OF THE STATE OF FLORIDA

CASE NO: 65,729

PARK AVENUE INVESTMENT & DEVELOPMENT, INC., a Florida corporation, MARK LOSEE, RALPH SNELGROVE, DREW APGAR, and EVERETT HENSLEY, General Partners d/b/a BAREFOOT MAILMAN, LTD., a Florida limited partnership, BAREFOOT MAILMAN OWNERS ASSOCIATION, INC., a Florida non-profit organization, BAREFOOT MANAGEMENT COMPANY, a Florida corporation, CAXTON, LTD., a British Virgin Island corporation, and MARK LOSEE and DREW APGAR, individually,

Appellants,

v.

DONALD I. BARKHEIMER, II, PEGGY A. BARKHEIMER, his wife, DONALD L. BARKHEIMER, G. LOUISE BARKHEIMER, his wife, HARRY RANKER, VIRGINIA RANKER, his wife, DENNIS REED, SANDRA REED, his wife, GENEVA L. BARKHEIMER, and JOSEPH D. FARISH, JR., and ROBERT V. ROMANI, d/b/a FARISH, FARISH & ROMANI,

Appellees.

REPLY

Appellants file this Reply to Appellees' Response to Motion for Reinstatement as follows:

Appellees acknowledge that a declaration of invalidity as applied and the inherency doctrine are vehicles by which the court has jurisdiction over the present appeal. Appellees simply contend that §687.071 F.S. was not held unconstitutional in the present case. Rather, Appellees argue that the Fourth District applied GUNN PLUMBING, INC. V. DANIA BANK, 252 So.2d 1 (Fla. 1971) and held that the defense of usury had been waived by appellant when they entered into the joint stipulation. Appellees argue that this Court's decision in GUNN PLUMBING turned upon the fact that "the usury statute in this state does not have the effect of invalidating contracts for interest at a rate higher than the statutory maximum, but only accords to the obligor the privilege of setting up, or waiving, affirmative defenses of usury in respect to such contracts". However, what Appellees overlook is that the statute existing at the time GUNN PLUMBING was decided, §687.07 F.S. (1965) did *not* have the effect of invalidating usurious contracts, but the statute under which the present case was decided, §687.071(7) does in fact invalidate usurious contracts entered into in this state. Therefore, the very basis for the decision in GUNN PLUMBING no longer exists.

Appellees argue that the new statute is no different from the old statute because the latter provided for forfeiture of the principal and interest of a usurious loan. However, as shown by GUNN PLUMBING, the forfeiture provision was subject to being waived by the borrower. Waiver is not possible under §687.071(7) which provides that a usurious contract is not enforceable in this state. As a matter of public policy the statute has the effect of invalidating usurious contracts.

It is submitted that the District Court necessarily

held §687.071(7) invalid because that is the only way the court could have come to the conclusion that it did and that is the only way the court could have relied upon GUNN PLUMBING to the complete exclusion of §687.071. If §687.071 had been applied, the usurious loans would be unenforceable and judgment should have been entered for Appellants.

Appellants request this Court to reinstate this appeal and allow briefs to be filed on the merits.

I HEREBY CERTIFY that a copy of the foregoing has been mailed to: ROBERT V. ROMANI, ESQ., Denco Building, 316 First Street, West Palm Beach, FL 33401; and O'CONNOR, BAYLER AND ELLIOTT, 8895 North Military Trail, Suite 301-D, Palm Beach Gardens, FL 33410, this 20th day of SEPTEMBER, 1984.

HAL P. DEKLE, ESQ.
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Attorneys for Petitioners

By: /s/ Signed
EDNA L. CARUSO

APPENDIX "V"

ORDER DENYING
MOTION FOR REINSTATEMENT

IN THE SUPREME COURT OF FLORIDA

MONDAY, NOVEMBER 5, 1984

CASE NO. 65,729

District Court of Appeal, 4th District
Nos. 83-311 & 83-1004

BAREFOOT MAILMAN LTD., ET AL.,

Appellants,

vs.

DONALD I. BARKHEIMER, II, ET AL.,

Appellees.

On consideration of the motion for reinstatement filed by attorneys for appellants, and response thereto,

IT IS ORDERED by the Court that said motion be and the same is hereby denied.

The motion to consolidate filed by attorneys for appellants is hereby denied.

A True Copy
TEST:
(SEAL)
Sid J. White
Clerk Supreme Court

C
cc: Hon. Clyde L. Heath, Clerk
Hon. John B. Dunkle, Clerk
Hon. William C. Williams, III, Judge

By: /s/ Signed
Deputy Clerk

Hon. William C. Owen, Jr., Judge

Edna L. Caruso, Esquire
Hal P. Dekle, Esquire
Springer, Springer, Mighdoll & Salnick
Robert V. Romani, Esquire
O'Connor, Bayler & Elliott